No. 09-1029

Supreme Court, U.S.
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IN THE

United States Supreme Court

GUY MASSI,

Petitioner,

against

EDWARD FLYNN, individually and as Chief of Police of the Village of Mamaroneck, ROBERT HOLLAND, as a member of the Police Department, PHILLIP TRIFILETTI, as Mayor of the Village of Mamaroneck, WILLIAM J. PAONESSA, Trustee, ANTHONY VOZZA, Trustee, CHRISTIE DERRICO, Trustee, JOSEPH ANGILETTA, Trustee, and THE VILLAGE OF MAMARONECK, NEW YORK,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Joseph A. Saccomano, Jr.
Jonathan M. Kozak*
**Counsel of Record*
Jackson Lewis LLP
One North Broadway, 15th Floor
White Plains, New York 10601
(914) 328-0404

QUESTION PRESENTED

1.Whether the District Court and Court of Appeals properly dismissed Petitioner's class-of-one equal protection claim as a matter of law?

2.Whether the District Court and Court of Appeals properly dismissed Petitioner's due process claim as a matter of law?

TABLE OF CONTENTS

page

QUESTIONS PRESENTED i

COUNTER-STATEMENT OF THE CASE 1

I. Massi's Employment With The Village of Mamaroneck Police Department. 1

II. Massi Received Disciplinary Charges For Failing To Appear For An Interview With Chief Flynn And For Refusing To Report For Light Duty. 2

III. Massi Received A Second Set Of Disciplinary Charges For Further Violations Of VMPD Rules And Regulations. 6

IV. Massi's Applications For Disability, Retirement And Workers' Compensation Benefits And Related Court Proceedings. 7

V. Massi's Federal Court Lawsuit And Related Appeals. 10

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI 14

I. The Petition Does Not Present A Conflict Between The Circuits Or An Important Federal Question 14

II. The District Court And Court Of Appeals Properly Dismissed Massi's Due Process Claim As A Matter Of Law. 15

A. Massi Does Not Possess a Property Interest In The Receipt Of GML § 207-c Benefits..... 15

B. Respondents Provided Massi Notice And An Opportunity To Be Heard Prior To Denying His Application For GML § 207-c Benefits .. 17

C. Massi Has An Adequate Post-Deprivation Procedure To Challenge Any Purported Deprivation Of His Property Interests..... 18

D. Massi Improperly Attempts To Advance New Legal Arguments In His Petition..... 19

III. The District Court And Court Of Appeals Properly Dismissed Massi's Equal Protection Claim As A Matter Of Law 20

CONCLUSION..... 22

TABLE OF AUTHORITIES

FEDERAL CASES *page(s)*

Bath Iron Works Co. v. Director, Office of Workers' Compensation Programs, 506 U.S. 153, 113 S. Ct. 692 (1993) 19, 21

Bd. of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701 (1972) 16

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487 (1985) 17

Engquist v. Or. Dep't of Agric., 553 U.S. 591, 128 S. Ct. 2146 (2008) 13, 20

Finley v. Giacobbe, 79 F.3d 1285 (2d Cir. 1996) 16

Green v. Bauvi, 46 F.3d 189 (2d Cir. 1995) 16

Gudema v. Nassau County, 163 F.3d 717 (2d Cir. 1998) 19

Hellenic American Neighborhood Action Committee v. City of New York, 101 F.3d 877 (2d Cir. 1996) 18

Moccio v. New York State Office of Court Administration, 95 F.3d 195 (2d Cir. 1996) 18

Rayway Ref. Co. v. Oxygenated Mtkg. & Trading A.G., 215 F.3d 219 (2d Cir. 2000) 19, 21

Rivera-Powell v. New York City Bd. of Elections, 470 F.3d 458 (2d Cir. 2006) 18

Singleton v. Commissioner, 439 U.S. 940, 99 S. Ct. 335 (1978) 15

Valmonte v. Bane, 18 F.3d 992 (2d Cir. 1994) 18

Vargas v. City of New York, 377 F.3d 200 (2d Cir. 2004) 18

STATE CASES

Cole-Hatchard v. Sherwood, 309 A.D.2d 933, 766 N.Y.S.2d 113 (2d Dep't 2003) 16

De Paolo v. County of Schenectady, 200 A.D.2d 277, 613 N.Y.S.2d 492 (3d Dep't 1994) 16

McTigue v. Town of Clarkstown, 21 A.D.3d 374, 798 N.Y.S.2d 915 (2d Dep't 2005) 16

Olivier v. County of Rockland, 260 A.D.2d 482, 688 N.Y.S.2d 580 (2d Dep't 1999) 16

Schenectady County Sheriff's Benevolent Ass'n v. McEvoy, 124 A.D.2d 911, 508 N.Y.S.2d 663 (3d Dep't 1986) 16

FEDERAL STATUTES

42 U.S.C. § 1983 ..... 11, 12, 16, 18

STATE STATUTES

General Municipal Law
Section 207-c..... 7, 8, 9, 10, 13, 14, 15, 16, 17, 18, 19

New York Civil Practice Law and Rules Article 78 .... 7, 10, 11, 12, 13, 14, 15, 17, 18, 19

New York Unconsolidated Laws
Section 5711-q..... 5, 11, 12

COUNTER-STATEMENT OF THE CASE

I. Massi's Employment With The Village of Mamaroneck Police Department.

Petitioner Guy Massi ("Massi"), a Sergeant employed by the Village of Mamaroneck Police Department ("VMPD"), brought this action against Respondents Edward Flynn, Chief of Police of the Village of Mamaroneck, Detective Sergeant Robert Holland (now retired); (2) former Mayor Philip Trifiletti; (3) former Village of Mamaroneck Trustees William J. Paonessa, Anthony Vozza, Christie Derrico and Joseph Angilletta (hereinafter collectively referred to as the "Board of Trustees"); (4) the Village of Mamaroneck; and (5) Defendant John O'Reilly, labor counsel to the Village of Mamaroneck.

Massi began his employment as a police officer with the VMPD on February 7, 1994. On June 8, 2000, Massi responded to a dispatcher call regarding a merchant complaint at a store located in the Village of Mamaroneck. According to Massi, he and Sergeant Monachelli entered the store and observed the merchant and a customer, both of whom were females. According to Massi, the merchant mouthed the word "gun" and Massi then saw a man in the store pointing a gun at him. Sergeant Monachelli, Massi, the customer and the merchant all ran out of the store. Massi exited the store before the merchant. The merchant was the last person to exit the store. By this time, numerous VMPD officers had arrived at the scene. The suspect surrendered without any officer or the suspect discharging their weapon.

Massi took a statement from the merchant. In the statement, the merchant stated that she had been raped by the man in the store. She also described the events in a manner indicating that Massi was not confronted by the man with a gun. Massi told the District Attorney a different version of events that transpired inside the store than what the merchant/ rape victim reported. The merchant testified at Massi's subsequent Workers' Compensation hearing that the suspect did not point his gun at Massi.

No VMPD member who participated in the June 8, 2000 incident was referred to the VMPD psychologist pursuant to the Department's Post Critical Incident Debriefing policy, General Order No. 19.07. Prior to April 15, 2004 - - almost four years after this incident - - Massi did not inform any VMPD member that he suffered from any emotional or physical issues as a result of the June 8, 2000 incident.

Following the June 8, 2000 incident, Massi interviewed for a promotion to the rank of sergeant. In June 2001, Massi was promoted to the rank of sergeant. Chief Flynn recommended Massi for the promotion.

II. Massi Received Disciplinary Charges For Failing To Appear For An Interview With Chief Flynn And For Refusing To Report For Light Duty.

In or about January or February 2003, Chief Flynn and Massi discussed whether Massi had any problems with another police officer. Chief Flynn initiated this meeting to clarify reports he had received indicating

that the police officer was reporting late for his tour of duty. Massi supervised the officer and it was Massi's responsibility to ensure he reported on time for his tour of duty. Massi informed Chief Flynn that he did not experience any problems with the officer.

In February 2003, Chief Flynn initiated a second meeting with Massi because Chief Flynn received additional reports that the police officers on Massi's squad complained to Massi that the officer received preferential treatment. Notwithstanding these complaints, Massi reiterated to Chief Flynn that he had no problems with the officer. However, officers in Massi's squad met with Massi and stated they were upset that the officer made numerous switches to different tours of duty in order to avoid certain post assignments. Additionally, the officer admitted in a deposition that he repeatedly arrived late for work.

During the disciplinary hearings regarding the officer, Massi and the VMPD learned that certain police officers recorded conversations with other officers in violation of VMPD rules and regulations. On April 8, 2004, Massi received a Departmental Order from Chief Flynn. The April 8, 2004 Departmental Order required Massi to submit a written report in response to the information contained in the Order regarding the unauthorized recording of police officers. Other police officers received similar orders to the April 8, 2004 Order issued to Massi.

On or about April 13, 2004, Massi prepared a memorandum in response to Chief Flynn's April 8, 2004 Order. Massi's April 13, 2004 memorandum contained a summary of the information requested by

Chief Flynn. On April 14, 2004, Chief Flynn issued Massi a Departmental Order requiring him to appear for a meeting with Chief Flynn on April 17, 2004. Massi received the April 14, 2004 Departmental Order at the beginning of his midnight to 8:00 a.m. tour of duty on April 15, 2004. Chief Flynn requested the meeting with Massi to discuss the contents of his April 8, 2004 Departmental Order and Massi's response dated April 13, 2004.

At the end of his April 15, 2004 shift, Massi returned to his home. On April 15, 2004, at approximately 4:00 p.m., Massi allegedly awoke from a nightmare regarding the June 8, 2000 incident. Massi was briefly admitted to the hospital as a result of this alleged nightmare. Massi did not report for his interview with Chief Flynn on April 17, 2004. Since April 15, 2004, Massi has not returned to work or communicated with Chief Flynn. Massi claims that since April 15, 2004, he has been completely disabled and unable to work.

Because Massi claimed he was unable to work, on April 19, 2004, Lieutenant Mary Matero ordered Massi to appear at Industrial Medicine Associates for a fitness for duty evaluation. On May 19, 2004, Aryeh Klahr, M.D. evaluated Massi regarding his psychiatric fitness for duty as a police officer for the Village of Mamaroneck. Dr. Klahr concluded that while Massi was not psychiatrically fit to perform full police duties or carry a weapon, he could perform light duties. Dr. Klahr further concluded that performing light duty could be beneficial for Massi. When Chief Flynn spoke to Dr. Klahr, Dr. Klahr told him Massi was able to participate in an interview by the Chief and work

light duty. Based on Dr. Klahr's medical conclusions, Chief Flynn issued Massi a Departmental Order to report for light duty commencing June 7, 2004. Chief Flynn also issued Massi a second Departmental Order dated May 28, 2004, ordering Massi to appear for an interview with Chief Flynn on June 2, 2004.

Massi discussed the Departmental Orders to report for light duty and to appear for an interview with his Police Benevolent Association ("PBA") attorney. Massi's PBA attorney cautioned Massi that he "shouldn't be surprised if [he] got suspended if [he] didn't go back to work." As of May 28, 2004, Massi still had never appeared for the originally scheduled interview with Chief Flynn. Massi also did not appear for his June 2, 2004 interview with Chief Flynn or report for light duty.

On June 15, 2004, Massi received a Departmental Order and Notice of Discipline dated June 14, 2004, informing him that he was suspended from duty without pay pending a trial on his disciplinary charges pursuant to New York Unconsolidated Laws § 5711-q. Chief Flynn has the authority to suspend a police officer without pay pursuant to N.Y. Unconsolidated Laws § 5711-q(21). In addition, the Board of Trustees has the power to suspend without pay, pending trial of the charges, any member of the police force. See N.Y. Unconsolidated Laws § 5711-q(9). Massi was charged with violating five provisions of the Rules and Regulations Governing the Police Department of the Village of Mamaroneck ("Rules and Regulations") by failing to comply with the two orders issued by Chief Flynn: (1) to appear for the interview on June 2, 2004;

and (2) to report for light duty on June 7, 2004. Massi is not aware of any other police officer who failed to comply with an order from Chief Flynn to attend an interview or to report for light duty.

III. Massi Received A Second Set Of Disciplinary Charges For Further Violations Of VMPD Rules And Regulations.

In or about June 2004, prior to preferring additional disciplinary charges against Massi, Chief Flynn directed Detective Sergeant Holland to conduct an investigation regarding allegations that: (1) Massi falsely reported to Chief Flynn that no members of Massi's tour complained to him about an officer reporting late to work; (2) Massi directed lewd and degrading sexual gestures toward Lieutenant Matero; and (3) Massi referred to African-Americans as "spoons" and "Canadians." As part of the internal investigation, Detective Sergeant Holland interviewed police officers Regan Kelly, Eugene Guadagnolo, Dominick Carelli, Steve Girardi, Ossie Ramos and Doug Baron and Lieutenants Mary Matero and Hank Paul. Contrary to Petitioner's nefarious accusation, the evidence collected by Detective Sergeant Holland accompanied the Internal Investigation Report he provided to Chief Flynn. On July 19, 2004, Massi was served with a second set of disciplinary charges for: (1) his failure to take corrective action or report that the officer reported late to work; (2) falsely reporting to Chief Flynn that the officer did not report late to work or that police officers under Massi's command did not complain regarding the officer's repeated lateness; (3) directing lewd, degrading and sexual gestures toward

a female superior officer; and (4) referring to African-Americans as "Spoons." Plaintiff has not presented any evidence that the allegations contained in Detective Sergeant Holland's Internal Investigation Report and the July 19, 2004 disciplinary charges preferred against Plaintiff are false.

IV. Massi's Applications For Disability, Retirement And Workers' Compensation Benefits And Related Court Proceedings.

On or about June 9, 2004, Massi applied for disability benefits under General Municipal Law ("GML") § 207-c. On June 12, 2004, Massi applied for New York State Retirement benefits because he was no longer capable of working as a police officer. On or about March 13, 2006, Massi's application for Performance of Duty Disability Retirement benefits was denied. In addition, Massi applied for Workers' Compensation benefits due to the post traumatic stress disorder he claims he experienced regarding the June 8, 2000 incident. By decision dated December 18, 2006, the Workers' Compensation Board affirmed the Workers' Compensation Law Judge's denial of Massi's claim for Workers' Compensation benefits, and the judge's finding that Massi's psychological symptoms were caused by Respondents' lawful investigation of possible unauthorized and illegal activities of VMPD officers as opposed to the incident of June 8, 2000.

On July 22, 2004, Massi filed a petition in New York State Supreme Court, Westchester County, pursuant to New York Civil Practice Law and Rules ("CPLR") Article 78, seeking to prohibit the Village

of Mamaroneck and Chief Flynn from enforcing the disciplinary charges served on Massi and compelling the Village of Mamaroneck to restore him to the payroll retroactive to June 14, 2004. On December 22, 2004, Justice Mary H. Smith issued a Decision, Order and Judgment refusing to annul Massi's suspension without pay and ordering the Village of Mamaroneck to process Massi's application for GML § 207-c benefits to determine his eligibility for such benefits. Justice Smith also held that "[t]he law is well settled that [the] Chief of Police in Westchester County has the authority to suspend a police officer pending the trial on disciplinary charges."

Respondents provided Massi notice and an opportunity to submit evidence in support of his GML § 207-c application. Specifically, by letter dated February 28, 2005, Lieutenant Matero informed Massi that the Village of Mamaroneck scheduled him for an examination by Andrew P. Levin, M.D. to determine his eligibility for GML § 207-c benefits. Lieutenant Matero further advised Massi that his own physician also could conduct an examination and that he would be afforded an opportunity to submit additional medical documentation in support of his GML § 207-c application. On March 18, 2005, Dr. Levin examined Massi. On April 22, 2005, Dr. Levin issued a report following his examination of Massi. Dr. Levin diagnosed Massi as "malingering" and further noted that "the appearance of severe symptoms coincided with and enabled the claimant to avoid an ongoing investigation at work." On or about April 25, 2005, after Massi declined an opportunity to submit additional evidence in support of his GML § 207-c

application, Lieutenant Mary Matero, relying on the uncontroverted diagnosis of Dr. Klahr, informed Massi that the Village of Mamaroneck denied his application for GML § 207-c benefits.

On or about March 13, 2006, Massi filed an Order To Show Cause in New York State Supreme Court, County of Westchester, seeking an Order: (1) directing Respondents to conduct a GML § 207-c hearing; (2) staying Massi's disciplinary hearing scheduled for March 14, 2006; and (3) awarding Massi his salary and benefits retroactive to June 14, 2004. By Decision and Order dated April 27, 2006, Justice Smith vacated the Village of Mamaroneck's April 25, 2005 denial of Plaintiff's GML § 207-c benefits and ordered the Village of Mamaroneck to conduct a "GML § 207-c hearing" before an independent hearing officer to determine Massi's eligibility for such benefits. Justice Smith also enjoined the Village of Mamaroneck from conducting Massi's disciplinary hearing until a determination was rendered on his eligibility for GML § 207-c benefits. The Village of Mamaroneck appealed Justice Smith's April 27, 2006 Decision and Order on the grounds, *inter alia*, that New York law does not provide for a GML § 207-c hearing. Notwithstanding the appeal, the Village of Mamaroneck provided Massi a GML § 207-c hearing in compliance with Justice Smith's Order. On or about December 11, 2007, the New York State Supreme Court, Appellate Division, Second Department, dismissed the Village of Mamaroneck's appeal as academic because the Village of Mamaroneck already provided Massi the hearing.

The hearing was conducted before Hearing Officer Vincent P. D'Andrea. On or about June 27, 2008, Mr. D'Andrea denied Massi's application for GML § 207-c benefits, finding Massi was malingering the symptoms of PTSD and was capable of performing light duty work. The Village of Mamaroneck Board of Trustees adopted Mr. D'Andrea's decision. On September 18, 2008, consistent with the hearing officer's decision, Chief Flynn offered Massi the opportunity to report for a light duty assignment. Massi refused the offer to report for light work duty.

On or about October 8, 2008, Massi filed another petition in New York State Supreme Court, Westchester County (Index No. 22700/08), pursuant to CPLR Article 78, seeking review of the Village of Mamaroneck's September 8, 2008 determination which confirmed the determination of Hearing Officer Mr. D'Andrea denying Massi benefits pursuant to General Municipal Law § 207-c. On March 16, 2009, Justice Lester B. Adler issued a Decision, Order and Judgment transferring the case to the New York State Supreme Court, Appellate Division, Second Department. To date, the Appellate Division has not acted on Massi's petition.

V. Massi's Federal Court Lawsuit And Related Appeals.

Massi alleges Respondents treated him in a disparate manner and subjected him to selective prosecution by preferring two sets of disciplinary charges against him and suspending him without pay. Massi originally brought claims alleging: (1) violation

of his right of free speech under the First Amendment, 42 U.S.C. § 1983 (First Claim); (2) violation of his right to equal protection and selective prosecution under the Fourteenth Amendment, 42 U.S.C. § 1983 (Second and Third Claims); (3) violation of his right to equal protection under the Fourteenth Amendment, 42 U.S.C. § 1983 on the basis that N.Y. Unconsolidated Laws § 5711-q, authorizing the unpaid suspension of a police officer pending a disciplinary hearing, is unconstitutional on its face and as applied to Massi (Fourth and Fifth Claims); and (4) negligence against Chief Flynn under a pendent state law claim (Sixth Claim).

By Memorandum and Order dated February 1, 2005, the District Court dismissed Massi's Complaint in its entirety as to Village Attorney John O'Reilly. The District Court also dismissed the First and Sixth claims as to all Respondents, dismissed the Fourth and Fifth claims as to the individual Respondents, and denied Massi's cross-motion to amend the Complaint. The District Court held that N.Y. Unconsolidated Laws § 5711-q permits the Board of Trustees to suspend a police officer indefinitely without pay pending a disciplinary hearing. The District Court further held that if Massi intended to proceed with his Fourth and Fifth claims against the Village of Mamaroneck regarding the constitutionality of N.Y. Unconsolidated Law § 5711-q, he had to comply with Local Civil Rule 24.1 of the United States District Court for the Southern District of New York, and serve the New York State Attorney General with notice.

On November 30, 2005, Respondents moved for summary judgment on Massi's remaining claims: the Second and Third claims alleging unequal treatment and selective prosecution under the Fourteenth Amendment, 42 U.S.C. § 1983; and the Fourth and Fifth claims against the Village of Mamaroneck regarding the constitutionality of N.Y. Unconsolidated Laws § 5711-q. On January 31, 2006, Massi filed a cross-motion for summary judgment to add a procedural due process claim.

In its May 15, 2006 Memorandum and Order, the District Court: (1) dismissed the Fourth and Fifth claims regarding the constitutionality of N.Y. Unconsolidated Law § 5711-q due to Massi's failure to comply with Local Rule 24.1; (2) denied the Respondents' motion on Massi's Second and Third claims for selective prosecution and unequal treatment; (3) denied Massi's cross-motion for summary judgment; (4) granted Massi leave to amend to add a due process claim and denied the Respondents' summary judgment motion as to that claim; and (5) denied Chief Flynn's motion for summary judgment on the basis of qualified immunity. Therefore, the only remaining claims in the case were Massi's Second and Third claims based on equal protection and the newly added due process claim.

On or about May 24, 2006, Chief Flynn appealed the denial of his motion for summary judgment based on the defense of qualified immunity as to the remaining claims. In addition, all Respondents requested the United States Court of Appeals for the Second Court to exercise pendent appellate jurisdiction over the

District Court's denial of their motion for summary judgment on the remaining claims. On November 16, 2007, the Second Circuit affirmed the decision of the District Court and remanded the case to the District Court.

On September 10, 2008, Respondents requested that the District Court dismiss Massi's remaining claims for equal protection and due process violations. Respondents argued that this Court's decision in Engquist v. Or. Dep't of Agric., 553 U.S. 591, 128 S. Ct. 2146 (2008) invalidated Massi's "class of one" equal protection claim. In addition, Respondents argued Massi's due process claim failed as a matter of law because: (1) Massi could not demonstrate that he was deprived of a protected property interest in order to state a valid due process claim; (2) Respondents provided Massi notice and an opportunity to be heard prior to denying his application for GML § 207-c benefits and also provided him a GML § 207-c hearing; and (3) Massi had an adequate post-deprivation state remedy to safeguard his alleged property right which he is currently pursuing through his New York Civil Practice Law and Rules Article 78 ("Article 78") petition. On October 8, 2008, the District Court dismissed Massi's equal protection and due process claims.

On November 10, 2008, Massi filed a Notice of Appeal. Massi limited the issues on appeal to the District Court's ruling that Massi's equal protection and due process claims failed as a matter of law. Massi did not appeal the dismissal of any of his other causes of action. By Summary Order dated November

24, 2009, the Second Circuit affirmed the judgment of the District Court. The Second Circuit held that this Court's Engquist decision barred Massi's equal protection claim because "Massi only claims that he was treated differently from other similarly situated employees for malicious reasons or due to his alleged psychological injury and failure to cooperate with Flynn's investigation of another police officer, and not on the basis of his membership in any particular class." (See Petitioner's Appendix at 3a). The Second Circuit affirmed the dismissal of Massi's due process claim because: (1) Massi did not have a property interest in the receipt of GML § 207-c benefits; and (2) Massi received a hearing and challenged the results of the hearing by bringing an Article 78 proceeding which constitutes an adequate pre-deprivation and post-deprivation remedy under New York law. (See Petitioner's Appendix at 4a).

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I. The Petition Does Not Present A Conflict Between The Circuits Or An Important Federal Question.

A petition for a writ of certiorari is granted only for compelling reasons. (Sup. Ct. Rule 10). The instant case does not meet any of the criteria established in Rule 10 for granting the petition because the decision issued by the Second Circuit does not conflict with the decision of another United States court of appeals, the New York Court of Appeals or this Court. See also

Singleton v. Commissioner, 439 U.S. 940, 945, 99 S. Ct. 335, 339 (1978) ("the absence of any conflict among the Circuits is plainly a sufficient reason for denying certiorari"). Petitioner requests this Court grant the petition because he argues that the Second Circuit misapplied the facts and the law in affirming the District Court's dismissal of his due process and equal protection claims. The District Court and the Second Circuit viewed the facts in the light most favorable to Petitioner and applied controlling legal principles in dismissing his claims. Nonetheless, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." (Sup. Ct. Rule 10). Accordingly, the Petition For Writ Of Certiorari should be denied.

II. The District Court And Court Of Appeals Properly Dismissed Massi's Due Process Claim As A Matter Of Law.

The District Court and Second Circuit correctly dismissed Massi's due process claim because: (1) Massi did not possess a property right in the receipt of GML § 207-c benefits; (2) Respondents afforded Massi notice and an opportunity to be heard in support of his application for GML § 207-c benefits; (3) Respondents afforded Massi a hearing in compliance with the Order of Justice Smith; and (4) Massi's filing of an Article 78 appeal to challenge the denial of his application for GML § 207-c benefits constitutes an adequate pre-deprivation and post-deprivation remedy under New York law.

A. Massi Does Not Possess a Property Interest In The Receipt Of GML § 207-c Benefits.

Massi must demonstrate that he was deprived of a protected property interest to state a valid procedural due process claim under the Fourteenth Amendment. See Bd. of Regents v. Roth, 408 U.S. 564, 569, 92 S. Ct. 2701, 2705 (1972); Green v. Bauvi, 46 F.3d 189, 194 (2d Cir. 1995). It is well established that a police officer is only entitled to a due process hearing where GML § 207-c benefits are revoked or terminated. See McTigue v. Town of Clarkstown, 21 A.D.3d 374, 375, 798 N.Y.S.2d 915 (2d Dep't 2005); Cole-Hatchard v. Sherwood, 309 A.D.2d 933, 766 N.Y.S.2d 113 (2d Dep't 2003); Olivier v. County of Rockland, 260 A.D.2d 482, 483, 688 N.Y.S.2d 580 (2d Dep't 1999). Massi's GML § 207-c benefits were not revoked or terminated as he was not eligible to initially receive such benefits. It is uncontroverted that a municipality has the discretion to initially determine an employee's eligibility for benefits. See De Paolo v. County of Schenectady, 200 A.D.2d 277, 380, 613 N.Y.S.2d 492, 494 (3d Dep't 1994).

Further, "[a] plaintiff must have a property interest in a benefit that is 'more than an abstract need or desire for it...[He] must, instead, have a legitimate claim of entitlement to it' under state or federal law in order to state a § 1983 claim." Finley v. Giacobbe, 79 F.3d 1285, 1296 (2d Cir. 1996) (quoting Bd. of Regents, 408 U.S. at 577; 92 S. Ct. at 2709)). A police officer who submits an application for GML § 207-c benefits merely possesses an expectation of receiving such benefits. See Schenectady County Sheriff's Benevolent

Ass'n v. McEvoy, 124 A.D.2d 911, 508 N.Y.S.2d 663, 664 (3d Dep't 1986). Accordingly, because Massi does not have a property interest in the receipt of GML § 207-c benefits, the Second Circuit correctly held that he cannot state a viable due process claim.

B. Respondents Provided Massi Notice And An Opportunity To Be Heard Prior To Denying His Application For GML § 207-c Benefits.

Even if Massi possessed a property right in the receipt of GML § 207-c benefits, and if his current Article 78 proceeding challenging the denial of his benefits does not bar his due process claim, Massi's claim still must be dismissed because Respondents afforded Massi due process prior to denying his application for GML § 207-c benefits. "The essential requirements of due process ... are notice and an opportunity to respond." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546, 105 S. Ct. 1487, 1495 (1985). Respondents provided Massi notice and multiple opportunities to present evidence in support of his application for GML § 207-c benefits prior to denying him benefits. Respondents processed Massi's GML § 207-c application pursuant to its general policies and procedures that apply to all Village of Mamaroneck police officers.

Lieutenant Matero relied on the medical opinion of Dr. Levin in making her recommendation to deny Massi GML § 207-c benefits. Respondents also conducted a four-day hearing before an independent hearing officer, even though they were not required to conduct a hearing under the law, to determine Massi's eligibility for GML § 207-c benefits. The hearing

officer determined Massi was not eligible for GML § 207-c benefits. Massi's ability to present evidence in support of his application for GML § 207-c benefits, both before and during his hearing, satisfies any due process requirements Respondents were required to afford Massi. See Rivera-Powell v. New York City Bd. of Elections, 470 F.3d 458, 466-68 (2d Cir. 2006) (holding that a candidate's opportunity to voice her objection to the removal of her name from the ballot, coupled with an adequate judicial remedy of an Article 78 proceeding to challenge any alleged error, provided her with sufficient due process).

C. Massi Has An Adequate Post-Deprivation Procedure To Challenge Any Purported Deprivation Of His Property Interests.

To prevail under a procedural due process claim, "a plaintiff must show that the 'procedural safeguards... established by the state are insufficient to protect [his] rights.'" Moccio v. New York State Office of Court Administration, 95 F.3d 195, 200 (2d Cir. 1996) (citing Valmonte v. Bane, 18 F.3d 992, 1002 (2d Cir. 1994)). "There is no constitutional violation (and no available [section] 1983 action) when there is an adequate state post-deprivation procedure to remedy a random, arbitrary deprivation of property or liberty." Hellenic American Neighborhood Action Committee v. City of New York, 101 F.3d 877, 882 (2d Cir. 1996). An Article 78 petition is an adequate post-deprivation remedy for due process purposes for violations due to the random and arbitrary acts of state employees. Id. at 881-82. See also Vargas v. City of New York, 377 F.3d 200,

208 (2d Cir. 2004); Gudema v. Nassau County, 163 F.3d 717, 724-25 (2d Cir. 1998).

Respondents appointed independent hearing officer Vincent D'Andrea to conduct Massi's GML § 207-c hearing. On or about June 27, 2008, Mr. D'Andrea denied Massi's application for GML § 207-c benefits because he was malingering the symptoms of PTSD and he was capable of performing light duty work. On or about October 8, 2008, Massi filed an Article 78 proceeding to challenge the denial of his application for GML § 207-c benefits. Massi's Article 78 petition is currently pending before the Appellate Division, Second Department. Because Massi is challenging the denial of his GML § 207-c benefits through an Article 78 proceeding, the District Court and Court of Appeals properly dismissed his due process claim as a matter of law.

D. Massi Improperly Attempts To Advance New Legal Arguments In His Petition.

In his petition, Massi argues that "a fair reading of the Complaint sets forth a conspiracy with Flynn, Holland and Mateo as the principal actors." (Petition at 13). Although it is not clear what type of conspiracy claim Massi attempts to assert in the Petition, he did not advance this argument before the District Court or the Second Circuit. Accordingly, Massi has waived his right to raise this issue in connection with the instant Petition. See Bath Iron Works Co. v. Director, Office of Workers' Compensation Programs, 506 U.S. 153, 162, 113 S. Ct. 692, 698 (1993); Rayway Ref. Co. v. Oxygenated Mtkg. & Trading A.G., 215 F.3d 219,

222 n.2 (2d Cir. 2000) (an appellate court will not consider an issue raised for the first time on appeal). Regardless, Massi's due process claim is invalid for the same reasons discussed above.

III. The District Court And Court Of Appeals Properly Dismissed Massi's Equal Protection Claim As A Matter Of Law.

Massi does not dispute that he alleges a class-of-one equal protection claim or that this Court invalidated class-of-one equal protection claims in the public employment context. See Engquist v. Or. Dep't of Agric., 553 U.S. 591, 128 S. Ct. 2146 (2008). Instead, Massi argues his class-of-one equal protection claim is not barred by this Court's Engquist decision because his employment was not "similarly situated" to Engquist's employment. (Petition at 14). Massi's argument is unavailing. This Court's holding that the class-of-one theory of equal protection has no application in the public employment context bars Massi's equal protection claim. As the Second Circuit correctly summarized, "[b]ecause Massi claims only that he was treated differently from other similarly situated employees for malicious reasons or due to his alleged psychological injury and failure to cooperate with Flynn's investigation of another police officer, and not on the basis of his membership in any particular class, his equal protection claim is barred by Engquist." (See Petitioner's Appendix at 3a).

In his petition, Massi also argues for the first time that he "alleges a conspiracy to essentially remove him from his position" and "deprive him of equal

protection." (Petition at 14). Massi did not advance this argument before the District Court or the Second Circuit. Accordingly, Petitioner has waived his right to raise this issue in connection with the instant Petition. See Bath Iron Works, 506 U.S. at 162, 113 S. Ct. at 698; Rayway Ref. Co., 215 F.3d at 222 n.2. Nonetheless, Massi's admission that he alleges a class-of-one equal protection claim bars his claim as a matter of law.

CONCLUSION

Massi has not presented any compelling reasons for this Court to grant a writ of certiorari. In addition, the District Court and Court of Appeals correctly dismissed Massi's due process and equal protection claims as a matter of law. Accordingly, the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

JACKSON LEWIS LLP
One North Broadway, 15th Floor
White Plains, New York 10601
(914) 328-0404

Joseph A. Saccomano, Jr.
Jonathan M. Kozak*
*Counsel of Record

ATTORNEYS FOR RESPONDENTS

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White Plains, New York

Bold Appellate Solutions

1140 Broadway, Suite 1602, New York, NY 10001 • Tel: 212-251-0006
www.boldappeal.com

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